



WASHINGTON WATCH

Next Generation Compliance and Its Implications for Industry

By Lynn L. Bergeson

“Next Generation Compliance” is the U.S. Environmental Protection Agency’s (EPA) signature initiative intended to increase compliance with environmental regulations by using advances in pollution monitoring and information technology and by more effectively using and designing regulations and permits to reduce pollution and enhance compliance. This column describes EPA’s initiative, discusses several examples of its applications in rulemakings and civil enforcement settlements, discusses another new compliance-related tool, eDisclosure, and outlines the implications for industry of these novel approaches to incentivizing compliance.

Next Generation Compliance

According to EPA, Next Generation Compliance, or Next Gen Compliance, as EPA refers to it, consists of five components. These include:

- Designing regulations and permits so they are easier to implement and better to assure improved compliance and environmental outcomes;
- Using advances in pollution monitoring and pollution detection technologies to detect and abate pollution and noncompliance;

- Shifting to electronic reporting to enhance efficiency and improve transparency; expanding transparency by making information more accessible to the public; and,
- Developing innovative enforcement approaches to achieve compliance.

EPA's new approach to compliance relies on using information technology and pollutant monitoring methods to achieve compliance and reduce pollution. Compliance has always been at the heart of enforcement. Reducing pollution, while an implicit goal of environmental protection and plainly a goal of the Pollution Prevention Act of 1990, has not historically been a stated goal of the Agency's enforcement program. Next Gen Compliance, thus, represents the melding of two clear objectives of the Obama Administration— compliance with environmental laws and a commitment to pollution prevention.

True to its moniker, Next Gen Compliance seeks to achieve these goals through information technology tools, smarter regulations, and innovative permit conditions. Information technology tools for purposes of Next Gen Compliance include:

- More effective regulations and permits that include built-in compliance mechanisms, such as continuous monitoring for stationary sources;
- Advanced monitoring, including fence line monitoring and infrared camera systems;
- Greater transparency, including public availability of electronic data and third-party audits; and
- “Innovative” enforcement techniques, including the incorporation of these elements in administrative and/or judicial settlements and injunctive relief demands.

A compelling example of Next Gen Compliance and smarter rulemaking is EPA's April 2013 proposed rule requiring emissions controls for oil and gas producers (EPA, 2013). The Agency requested comment on a proposal to have equipment manufacturers certify air pollution control equipment as "compliance ready" to oil and gas extraction companies so that these entities could purchase and use these compliance-ready units and forego more costly and time-consuming field testing. A user's certification could be cross-checked with the manufacturer's sales confirmation, expediting compliance and eliminating more time-consuming compliance checks. While the provision did not survive the rulemaking process, it is important to note that EPA is committed to using the rulemaking process to advance its goals in this regard.

Other recent rulemaking initiatives relate to the conversion from paper to electronic reporting. When EPA shifted to electronic reporting for Clean Water Act (CWA) submissions, the Agency claimed to have saved \$29 million per year on transaction costs. Similar cost savings have been attained under Toxic Substance Control Act (TSCA) electronic reporting requirements.

Next Gen Compliance Tools in Civil Enforcement

More recently, EPA adapted its Next Gen Compliance thinking for use in civil enforcement settlement (EPA, 2015). According to EPA, Next Gen Compliance tools in this context are defined by one or more of three features:

- Use of practices or requirements that are not yet commonly included in typical settlements;
- Use of modern information technology and/or advanced technology so that information about pollutant releases and their qualitative levels are available closer to real time and are more accessible and more complete; and,
- Use of approaches to provide an effective structure for the settling party to comply with settlement requirements without increasing EPA's oversight burden.

As EPA's enforcement resources continue to diminish, this component is a particularly important facet of the Agency's enforcement settlement strategy. EPA's guidance identifies a few examples of advanced monitoring technologies. These include:

- Infrared video cameras to "see" emissions;
- Mobile monitors, including geospatial measurements of air pollution (GMAP);
- Fence line monitors, such as ultraviolet differential absorption spectroscopy measurement (UVDOAS);
- Continuous emissions monitoring (CEM);
- Solar occultation flux; and,
- Differential absorption light detection and ranging methodology (DIAL).

Since EPA's issuance of its enforcement settlements guidance in early 2015, these concepts are finding their ways into settlement agreements and the results are significant. Discussed below are a few illustrative examples of such settlements, along with an overview of their implications.

Enforcement Settlement Examples

In the District of Columbia District Court case, *United States of America v. HollyFrontier Refining & Marketing LLC*, HollyFrontier Refining & Marketing LLC, Frontier El Dorado Refining LLC, Holly Refining & Marketing Company - Woods Cross LLC, and Navajo Refining Company, L.L.C. entered into a settlement of alleged Clean Air Act (CAA) violations and agreed to install next generation pollutant detection technology during the implementation of the mitigation projects required under the settlement (United States of America, 2016). This required the retention of a third-party professional engineer to verify the companies' compliance with the terms of the mitigation projects.

In *Marathon Petroleum Corp.*, Marathon Petroleum Corp. and Marathon Petroleum Co. (collectively Marathon) agreed, as part of a settlement agreement, to use infrared gas-imaging technology to determine if "there are any significant gaseous emissions" (United States of America, 2015a, Page 1) using a gas-imaging camera to scan storage tanks to identify excess emissions. Under the terms of the settlement, if tank defects are found, Marathon must undertake the repairs. (United States of America, 2015a). While the use of infrared cameras in the oil and gas industry is increasingly more common today than previously, concerns have been expressed about data accuracy, cost, and the reliance upon the data for regulatory and enforcement purposes (Schoof, 2016).

In *BP Products North America, Inc.*, BP Products North America, Inc. (BPP) was required, as part of a settlement agreement, to install, operate, and maintain a fence line monitoring system and make the data collected available to the public on a dedicated website or through BPP's Internet homepage "in a manner that shall be readily accessible, clearly labeled, and clearly presented to the public." (United States of America, 2015b). The website requirement in particular adds an element of transparency that some could find troubling, especially if the data reveal indiscretions.

Overview of Implications

The implications of these next generation tools are significant. The expanded use of electronic reporting and the public dissemination of data as a regulatory tool ups the ante considerably in instances of potential noncompliance and the implications of such noncompliance. EPA's Office of the Inspector General (OIG), for example, has on several occasions expressed interest in better understanding why EPA is not routinely relying on Toxics Release Inventory (TRI) reporting data required under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) to identify potentially unregulated facilities and evaluate compliance with surface water discharge permitting requirements and Risk Management Program reporting requirements (EPA Office of the Inspector General [OIG], 2016). With forthcoming Chemical Data Reporting (CDR) rule obligations under TSCA Section 8, regulated entities need to see this reporting cycle as another opportunity for the Agency to invoke its Next Gen Compliance thinking, and review these data carefully and cross-reference them with other EPA reporting databases for enforcement purposes.

Another important and potentially troubling aspect of Next Gen Compliance is EPA's willingness to pilot new and arguably unproven technologies as conditions of settlement in negotiated settlement agreements, and the reliance on these technologies for demonstrating compliance. On the one hand, this is exactly what well-represented parties negotiated in settling an enforcement action. On the other hand, it is not clear if these technologies have been validated for such purposes and whether their use in these compliance applications, or any other regulatory application, is appropriate.

Some stakeholders question whether the endorsement of new environmental technologies through Next Gen Compliance will evolve into a regrettable surrogate for more costly and protracted rulemaking that would otherwise be required to validate a technology for regulatory purposes. Viewed this way, the sidestepping of the inconvenient but necessary tasks of undertaking notice and comment rulemaking, cost-benefit analyses, and other Executive Order formalities required under the law and a routine part of formal rulemaking, raises potentially disturbing questions.

Finally, these new enforcement measures suggest a potential for tort actions that may not in all cases be preempted by CAA permit conditions. In *Bruce Merrick, et al, v. Diageo Americas Supply, Inc.*, the court held that the CAA does not preempt state common law tort claims against companies that hold a valid air permit (United States of America, 2015c). In that case, residents filed a nuisance suit claiming property damage based on ethanol emissions from a whiskey distillation facility. The court denied the defendant-emitter's argument that the facility's CAA

permit preempted common law claims brought against it, based on the law of the state in which the emitter operates.

eDisclosure

eDisclosure is another new enforcement and compliance-related program developed by EPA. In late 2015, the Agency launched its eDisclosure portal, providing companies with a new way to self-report violations of environmental law. The portal implements EPA's policy titled "*Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*," also referred to as EPA's Audit Policy (EPA, 2000). According to EPA, over the years since its issuance in 1995, thousands of companies have availed themselves of the benefits offered under the Audit Policy and continue to do so each year. The eDisclosure portal, in part, is intended to streamline the self-disclosure process for EPA and regulated entities. Entities that disclose potential violations through the new eDisclosure portal may qualify for one of two types of automated treatment, Category 1¹ or Category 2.²

For disclosures that qualify for Category 1 treatment, the eDisclosure system will automatically issue an electronic Notice of Determination (eNOD) confirming that the violations are resolved with no assessment of civil penalties, conditioned on the accuracy and completeness of the submitter's disclosure. EPA will spot check Category 1 disclosures to ensure compliance with EPCRA and that disclosure meets the conditions of the Audit Policy, the Small Business Compliance Policy, and eDisclosure. For disclosures that qualify for Category 2 treatment, the eDisclosure system automatically will issue an Acknowledgement Letter noting the Agency's

receipt of the disclosure and notifying the entity that it will make a determination as to eligibility for penalty mitigation, if and when it considers taking enforcement action for environmental violations. EPA will screen Category 2 disclosures for significant concerns, such as criminal conduct and potential imminent hazards.

It remains to be seen if industry warms to the new portal, or if the regulated community opts not to self-disclose and takes its chances in the event that noncompliance is discovered. While there is some measure of corporate comfort to be had in self-disclosing indiscretions, not everyone is convinced self-disclosure is the best or only way to go, especially when prompt correction of the problem arguably achieves the goals of environmental compliance.

Conclusion

EPA's forays into Next Gen Compliance and eDisclosure add to the mounting pressure on product manufacturers and others to steward wisely their chemical portfolios and product innovations. It also ups the ante to ensure that reporting under environmental laws is done carefully, accurately, and with a view toward the wider utility of all publicly available information that is disclosed when satisfying reporting obligations. The availability of new tools to optimize information that is shared among multiple EPA regulatory program offices collected under environmental permits and reporting requirements and disclosure obligations can be expected to increase. Federal enforcement personnel are increasingly driven by imperatives to do more with less and the desire to pursue settlement options that implement new environmental technologies—technologies that would otherwise take years to implement for regulatory

purposes through rulemaking—is too tempting to forego. Entities in the enforcement crosshairs may or may not fully appreciate the far-reaching implications of these choices, given the circumstances under which they are being made.

All of these initiatives help to create a culture of environmental stewardship that could make the eDisclosure portal surprisingly busy. For all entities that must satisfy permit and related environmental disclosure obligations, renewed care should be taken in preparing these disclosures, as they are being reviewed more intensively by more government offices—and for more reasons—than ever before.

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End Notes

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- ¹ Category 1 disclosures include: (1) violations of EPCRA that meet all Audit Policy conditions; and (2) EPCRA violations that meet all Small Business Compliance Policy conditions. Category 1 disclosures do *not* include: chemical release reporting violations under Section 304 of EPCRA or Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); or violations of EPCRA with significant economic benefit as defined by EPA.
 - 2 Category 2 disclosures include: (1) all non-EPCRA violations; (2) EPCRA violations where the discloser can only certify compliance with Audit Policy Conditions 2-9 (*i.e.*, discovery was not systematic); and (3) EPCRA and CERCLA violations excluded from Category 1 above.